United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1553

United States Court of Appeals

FOR THE SECOND CIRCUIT

74-1558, 74-1574, 74-1677

ILIGAN INTEGRATED STEEL MILLS, INC., CONTINENTAL INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY LTD., ROYAL INSURANCE COMPANY, LTD., FIREMAN'S FUND INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY AND AETNA INSURANCE COMPANY,

Plaintiffs-Appellants,

—against—

88 JOHN WEYERHAEUSER, her engines, boilers, etc., WEYERHAEUSER COMPANY, and NEW YORK NAVIGATION COMPANY, INC.,

Defendants-Appellees-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE-APPELLANT NEW YORK NAVIGATION COMPANY, INC.

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Statement

This is an appeal by plaintiffs-appellants Iligan Integrated Steel Mills, Inc. *et al.*, hereinafter called "Iligan" and protective cross-appeals by defendants-appellees-appel-

lants Weyerhaeuser Company, hereinafter called "Weyerhaeuser" and New York Navigation Company, Inc., hereinafter called "New York Navigation", from a final amended judgment dated April 18, 1974 (App. 63a-65a), entered in an Admiralty suit for cargo damage in the Southern District of New York (Ward, J.) granting Iligan recovery against defendants Weyerhaeuser and New York Navigation, granting New York Navigation indemnity from Weyerhaeuser including interest and stipulated attorneys' fees. The District Court limited plaintiffs' recovery to $500 per package.

This action was originally assigned to the late Honorable Edward C. McLean and a trial was held from July 17, 1972 to July 20, 1972 before Judge McLean. Unfortunately, Judge McLean died a short time later after all the evidence and briefs were in, but before rendering an opinion.

The case was reassigned to the Honorable Robert J. Ward and under a stipulation entered into and signed by all parties January 17, 1973, (26a-27a) everyone agreed that the case would be decided on the record as made before Judge McLean. Judge Ward decided the case March 14, 1974, after considering it for over a year and after hearing extensive oral arguments on February 7, 1974 (App. 62a).

Iligan noticed its appeal from the judgment on April 19, 1974. (App. 66a-67a). Weyerhaeuser filed a cross notice of appeal on April 23, 1974 and New York Navigation on May 3, 1974. (App. 7a).

New York Navigation believes the judgment below is correct in all respects, but it filed a protective appeal, in case this court should modify the award as to that part of

the judgment granting relief to Iligan, in which case New York Navigation requests the judgment granting indemnity to New York Navigation from Weyerhaeuser be also modified.

Weyerhaeuser's brief has been read and New York Navigation has tried to avoid repetition of any of the arguments made by Weyerhaeuser.

Facts

On July 11, 1966, New York Navigation agreed with Iligan to provide a sufficient number of "suitable and seaworthy" vessels to transport materials to be shipped by plaintiffs from U.S. ports to Iligan City at agreed freight rates. The agreement provided further that New York Navigation's standard form of bill of lading was to be used on all shipments and was to be stamped subject to the said agreement.

New York Navigation in turn time chartered the vessel in suit from Weyerhaeuser at a monthly rate on a New York Produce Exchange form time charter dated September 7, 1966. (E. 391). This form of agreement provided that the vessel was to be "tight, staunch, strong and in every way fitted for the service" and that the owners would "maintain her in a class and keep the vessel in a thoroughly efficient state . . ." (E. 391).

The bill of lading issued to Iligan by New York Navigation Company on its standard form was dated December 16, 1966, and paragraph 1 thereof incorporated the Carriage of Goods by Sea Act. (E. 35). Clause 2 provided that the word "Carrier" as used in the bill of lading "shall include

the ship, the owner, . . . and if bound thereby the time charterer." (E. 36). Clause 17 contained a $500 package clause substantially similar to the one in the U.S. Carriage of Goods by Sea Act, 46 U.S.C. §1304(5), hereinafter COGSA. (E. 38). Clause 26 provided that all agreements or freight engagements for the shipment of goods were superseded by the bill of lading. It also provided that "nothing in the bill of lading shall operate to limit or deprive the Carrier of any statutory protection or exemption from or limitation of liability." (E. 39).

Before the commencement of the charter party, New York Navigation appointed the National Cargo Bureau to survey the vessel at Baltimore. The vessel was in class in all respects and the vessel was accepted on charter. Only two months before the vessel had undergone U.S. Coast Guard and American Bureau of Shipping surveys at Portland.

The shipment in question was stowed in No. 2 and No. 4 holds of the John Weyerhaeuser. A total of "1,087 packages" of cargo was loaded. (E. 35). The cargo was described in 17 riders attached to the bill of lading.

The loading and stowage of the shipment was also approved by the National Cargo Bureau at Baltimore.

The vessel sailed from Baltimore on the night of December 16, 1966, bound for Tampa, Florida, and arrived on December 22, 1966. Hatches Nos. 1, 3, and 5, were inspected by a National Cargo Bureau surveyor and approximately 7,000 tons of triple superphosphate in bulk was loaded. The holds were found to be "absolutely dry". (App. 670a-671a). The vessel sailed from Tampa on December 23, 1966, and next called at Cristobal, Panama, on December 29, 1966, in order to bunker.

At Panama, the vessel underwent engine repairs until January 12, 1967. During the period of time that the vessel's engines were being repaired, the vessel was off hire. No reports were made to the charterer of any leakage.

The vessel then proceeded towards Moji, Japan, to replenish her fuel oil and water before proceeding to Mokpo, Korea, to discharge the triple superphosphate. The vessel arrived at Moji on February 22, 1967, and the Chief Officer read the draft which was greater than anticipated and, after inspections of the hatches, sea water was found in No. 2 and No. 3 holds.

Weyerhaeuser then arranged for American Bureau of Shipping surveyor to attend and a leak was found in the port side sanitary storm valve in No. 3 lower hold. This storm valve is attached to the vessel's sanitary line which discharges overboard. It is fitted with a check valve to prevent sea water from entering the line and to permit the sanitary line to be pumped overboard. The check valve was found "frozen" in an open position and the body of the valve was found "wasted". A hole had developed which permitted sea water to enter the ship.

Temporary repairs were conducted to the satisfaction of the A.B.S. surveyor and after a check by divers of the underwater portion of the hull, the vessel was permitted to proceed on its voyage.

During the voyage from Moji to Mokpo, the storm valve was found leaking again and at Mokpo another American Bureau of Shipping surveyor attended on board and further repairs were conducted. After discharging the superphosphate, the vessel sailed for Iligan City and arrived on March 26, 1967.

On March 27, 1967, after Iligan and owners had each appointed attorneys and surveyors, No. 2 hatch was opened. Surveyors thereafter attended to the damaged cargo.

When the vessel returned to the West Coast, the storm valve was removed from the vessel and sent to a metallurgist for analysis. The valve was also examined by Weyerhaeuser supervisory personnel and all agreed that the inside of the valve was wasted and corroded, which caused a hole to develop.

The testimony of Mr. Cesar R. Pereyra made it clear that the owner of the shipment was Iligan Integrated Steel Corp., and that Iligan Integrated had been paid by its insurer in full (App. 89a-94a). Any rights of Iligan Integrated were therefore subrogated to the underwriters.

Plaintiff's witness J. A. Best, an employee of Koppers Company, which had a technical services agreement with Iligan Integrated, identified the agreement between Iligan Integrated and New York Navigation. His company had assisted in "negotiating a contract for the carriage of goods" (App. 98a). He also identified a copy of the bill of lading issued pursuant to the contract (App. 111a-113a, E. 35). He knew it was the standard form of bill of lading and was familiar with it. (App. 158a). A copy of the form was attached to the Agreement. (App. 159a-163a). He said he had a short conversation with the Captain at Baltimore and that the Master had not told him that the ship had leaked on two previous voyages. (App. 117a). He had gone down into the hold himself and there was no water. (App. 165a). There were no pipes leaking. (App. 167a-168a). He first learned about water in the hold when the ship was at Moji. He went aboard the vessel at Moji and

saw water marks in the hold 15′ high. (App. 125a). The Master told him "it happened two or three days out of Moji when he had hit some heavy weather." (App. 126a).

Plaintiffs' cargo surveyor, William G. Davies, was sent by insurance underwriters to Iligan City (App. 178a), and he arrived before No. 2 lower hold was discharged. (App. 179a). There appeared to have been considerable accumulation of water in the compartment. (App. 180a). He said the depth was about 14′ to 15′. (App. 198a). The Captain told Davies that two or three days out of Moji he had a feeling that the vessel was down by the head. (App. 202a). Davies could not see the sanitary line valves on the port and starboard sides because cement boxes had already been built over them. (App. 206a-207a). There was no water in the other compartments he saw. (App. 207a-208a).

Mr. Davies testified that the SS JOHN WEYERHAEUSER was "in good shape", and was "a considerably better ship than the Liberties that I remember". (App. 208a-209a). Plaintiff's expert testified:

> "I would say she was a well maintained vessel." (App. 209a).

The clapper valves were located on each side of the after end of the hold about 20′ above the deck and were clearly visible. Any leaking from these valves would have been obvious to anyone working in the hold. The sanitary lines served the crew toilets up above. (App. 213a-216a).

At the trial Iligan offered portions of the Master's deposition (App. 218a-312a) and Weyerhaeuser offered the remainder (App. 329a) and it was marked as Weyerhaeuser Exhibit A. (E. 84).

The Master testified that on October 21, 1966, (two months before the shipment in suit, December 16, 1966) the vessel underwent an annual inspection in drydock at Portland, Oregon, by both the U.S. Coast Guard and the American Bureau of Shipping. (E. 87-89). Commander Rohberg of the Coast Guard told the Master and the Marine Superintendent that he had found the sanitary storm valves in very good condition. Both the Coast Guard and the A.B.S. certified the ship to be seaworthy. The Captain himself inspected the No. 3 hold at Madras, Baltimore and Tampa. (E. 91-92). He said he never found any indication of entry of *sea water* in the hold (E. 92), but he had a problem with water accumulating in the bilges, which he believed was fresh water. There was no indication, he said, that pipes had leaked. (E. 93). At Baltimore, the vessel underwent another survey when the vessel went on hire (E. 94) and the ship was "in good shape". (E. 96). The Captain believed the vessel was seaworthy when she sailed from Baltimore and Tampa. (E. 97). At Cristobal, the vessel had some water in the bilges. The Captain checked by tasting it and found it was fresh water. "It seemed that everytime we took fresh water we would get fresh water in that bilge". (E. 100). After pumping out the water, there was no further trouble until Moji. (E. 100-101). The Captain had never had trouble with clapper valves on Liberty ships. (E. 114). The witness readily admitted that on previous voyages the No. 3 port bilge required more pumping than other bilges. (E. 115). He said he and the engineer investigated the problem after discharging cargo at Madras and found "no evidence of any leakage in that hold at all". (E. 117). The Captain and the Mate "went down there all through that cargo hold to see if we had any leakage". (E. 117). At the shipyard in

Portland he had the plate near the bilge checked and audio-gauged. (E. 121). The storm valve was inspected at Portland and there was no hole in it. (E. 126-127).

> "As far as the sanitary valve leaking if it was leaking and 22 toilets running off there, we would have had water in the after port corner of No. 3 lower hold. It didn't show it. It gave me no cause for alarm, with this 18 inches in there." (E. 147).

However, since the bilges were 18" deep (App. 237a), this meant they were full.

In short the Captain's testimony amounts to (a) an admission that there had been some problem with water accumulating in No. 3 port bilge; but (b) that the Captain believed it was related to various sources of fresh water and (c) that he believed there was no cause for alarm because the problem was controllable by pumping. (E. 181-182).

Important to charterer's defense is the admission by the Master that no mention of any water leaking on previous voyages was ever made to New York Navigation. He was asked if he told Mr. Grevers at Baltimore and he said he had not. (Exhibit A—Dumble's Deposition, pages 144-145). Also, he did not tell New York Navigation about the water in the hold at Panama. (E. 173-174, and 196).

Plaintiffs' counsel readily admitted that he was not able to prove any knowledge of the alleged condition as far as New York Navigation was involved. (App. 789a).

Harold Raumgartner, Weyerhaeuser's Marine Superintendent, admitted that the maintenance and repair of the entire vessel was the duty of Weyerhaeuser under the time charter. (E. 223). This was also admitted by Mr.

Mandle, Weyerhaeuser's Operations Manager. (E. 321). Mr. Mandle also admitted that no one on behalf of Weyerhaeuser ever told New York Navigation about any problem of water accumulating in the bilge. (E. 361). In fact, the first time the flooding in suit was reported to the charterer was when the vessel arrived at Moji. (E. 385).

August A. Grevers, Vice President of New York Navigation, was called by Iligan as a witness. Mr. Grevers testified that after entering into the Agreement (Ex. 1), New York Navigation chartered a vessel under a form of time charter party requiring the owner to provide a seaworthy vessel. (App. 479a-480a). As charterer, New York Navigation had no right to make changes in the vessel or to make repairs. (App. 480a). New York Navigation necessarily relied upon Weyerhaeuser to provide a seaworthy vessel. (E. 481a).

Mr. Grevers described the circumstances of the issuance of the bill of lading. The shipper's forwarding agent filled out the bill of lading including a description of the cargo. The bill of lading was signed by New York Navigation's Baltimore agent "as agent for the Master". (App. 482a). The bill of lading was issued on December 16, 1966. (App. 743a). As an accommodation to the shipper, to enable it to process documents, a receipted freight invoice was also issued on December 16, 1966, but the payment of freight was not made until January 5, 1967. (App. 744a).

Mr. Grevers identified a letter from New York Navigation to the Master holding Weyerhaeuser responsible for damage to the cargo. (E. 70).

Mr. Herman Berke, a hull surveyor, accompanied Iligan's attorney to Iligan City. Temporary repairs had already

been made to the port valve by welding the hole which had developed (App. 351a) and he inspected only the outside of the valve at Iligan. (App. 355a-357a). Later, in May, 1967, he saw the inside of the valve when it was removed at a California shipyard. (App. 358a-360a). He said the disc had been removed in Japan (App. 361a-362a) and the seat inside the valve was partly missing, banged up and dented. (App. 362a-363a). The lugs on the cover plate were wasted and he saw some evidence of corrosion. (App. 364a-365a). However, he explained that even if the disc of the valve was mutilated, water would not have entered the ship except for the hole in the body of the valve. (App. 388a). It was the hole, which had to be welded, that allowed seawater to enter the cargo compartment. Mr. Berke did not know the size of the hole. (App. 397a-398a).

It was Mr. Berke's opinion that the leakage started prior to the beginning of the voyage in suit because of the bilge soundings recorded on the prior voyage. (App. 380a-381a).

As far as the starboard valve was concerned, Mr. Berke admitted he saw no sign of leakage in that valve. (App. 397a).

Mr. Berke admitted that there were many possible sources of water in a bilge on any ship, such as leaking hatches, wet cargo, ship's sweat, open sounding pipes, etc. (App. 416a-419a). Leakage from the sanitary valve would be obvious to a person looking at it in the hold. (App. 424a). There would have been streaks on the side of hold from the leakage. (App. 425a).

Mr. Berke testified that if there had been a hole in the valve on the previous voyage, anyone going into the hold would have observed a continuous stream of water coming in when the valve was below the water line (App. 440a-

441a) and odorous flushings from the toilets would come through even when the valve was above the water line. There should have been indications of water in the hold (App. 437a-439a), he said.

Since the bilges at the after end of No. 3 took care of No. 2 and No. 3 holds, it could be expected that they would accumulate more water than the bilges in other holds. (App. 445a).

The 18 inches of water which developed in the bilges at Baltimore, when the valve was *above* the water line, would have amounted to about 75 gallons and would have had some odor, if the liquid came from the toilets up above. (App. 463a-464a).

Captain deBouthillier, called as a marine expert, had reviewed numerous A.B.S. reports of inspections and had found no recommendations which the owner had not duly carried out. (App. 563a). The first readings of water in the bilges at Baltimore occurred the day after it snowed. (App. 638a). The exhibit he prepared of bilge soundings (Ex. 75) shows water accumulations in No. 1 and No. 5, as well as No. 3 at that time. Captain deBouthillier, who had never been on the ship, was more of an advocate than an independent expert.

Captain Record, on the other hand, was an eye witness employed by a disinterested inspection organization, the National Cargo Bureau. He was in the hold at Tampa after the vessel arrived from Baltimore with the appellants' cargo on board. Because fertilizer was to be loaded, his job was to make certain the hold was "absolutely dry." *He found no indication of any leaking and not even a trace of moisture.* (App. 670a-671a). *There was no smell of sewerage.* (App. 677a-678a).

After all the smoke is cleared away, the only evidence appellants produced at trial is the sort of evidence that is usually offered in most cargo damage cases. There is frequently evidence in such cases that hatch covers or pipes leaked before the commencement of the voyage and that the owner knew or should have known they would leak again. It all amounts to failure to exercise due diligence and liability by that route.

Bilge soundings are taken every day to determine how much water has accumulated during the past 24 hours and bilges are pumped frequently. No one has yet designed a ship that does not leak a drop. To deny the statutory protection of the U.S. Carriage of Goods by Sea Act on the flimsy circumstantial evidence offered here would be opening a Pandora's box in cargo litigation.

The problem with appellants' case is that it has failed to carry its burden of proving that the vessel was "grossly unseaworthy" at the beginning of the voyage, Baltimore, as alleged throughout the lower court proceedings. The evidence that there was some problem with water accumulating in the No. 3 port bilge on previous voyages, is at least balanced by evidence that the problem was controlled by pumping; that it seemed to be related to fresh water; that the vessel underwent two extensive inspections (one at the annual drydocking and one at the time of chartering) both *before* the voyage in suit; and that although knowledgeable persons, including several surveyors, plaintiffs' representatives and stevedores and ship's officers entered the hold, no one ever saw the valve in question leaking before the voyage in question. In view of the nature of the line, a sanitary line serving toilets up above, the fact that none of the witnesses ever observed leaking or smelled

any bad odor, is persuasive that the source of water which accumulated in the bilges up to the time the vessel left Tampa, was *not* the sanitary line.

Since the connection between the previous experience with water in the bilge and the subsequent leak from the holed valve is vital to this case, the Court should not be left to speculate about it.

The same is true of the occurrence at Panama. There is no persuasive evidence to support the allegation that Weyerhaeuser and New York Navigation willfully and with premeditation chose to continue the voyage knowing that cargo would be damaged.

There may have been failure to exercise due diligence to make the vessel seaworthy at the beginning of the voyage, Baltimore, or to take care of the cargo during the voyage, at Cristobal, but proof of deliberate and intentional conduct is wholly lacking. The credibility of the Master is bolstered by the fair assumption that he would not have embarked on a crossing of the Pacific Ocean if he thought the ship was taking sea water, with consequent peril to the crew, the ship and his own life, as well as plaintiffs' cargo.

Questions Presented

The questions presented by the appeal are whether the District Court erred in holding that:

I. Iligan failed to sustain its burden of proving gross unseaworthiness or willful and wanton misconduct.

II. The Agreement between Iligan and New York Navigation incorporated New York Navigation's standard form

bill of lading and all of that bill of ladings terms and conditions including the $500 package limitation.

III. Weyerhaeuser must indemnify New York Navigation for any and all losses resulting from the unseaworthiness of the vessel including reasonable counsel's fees.

POINT I

ILIGAN DID NOT SUSTAIN ITS BURDEN OF PROOF IN SHOWING GROSS NEGLIGENCE OR SUCH WILFUL AND WANTON MISCONDUCT SO AS TO CONSTITUTE A DEVIATION, THEREFORE THE DISTRICT COURT'S FINDINGS OF FACT MUST BE AFFIRMED.

Iligan has couched the language of the "ISSUES PRESENTED FOR REVIEW" so as to have it appear that questions of law are to be resolved on this appeal. However, it is clear that the arguments presented hinge on Iligan's basic disagreement with the critical findings of fact made by the trial court.

If Iligan is to succeed in modifying the Trial Court's findings that both defendants are not entitled to the package limitation, then this court must find error in the Trial Court's findings as to:

1. Defendants' knowledge of the unseaworthiness before commencing the voyage.

2. The defendants realized that the unseaworthy condition made the safe completion of the voyage impossible and that cargo damage was a certainty.

3. That the defendants had specific knowledge of the actual defect in the ship and did nothing to correct it.

The District Court after carefully reviewing all the witnesses' testimony, exhibits and depositions concluded

that the ship was unseaworthy in Cristobal, because of the corroded clapper valve, but that the master did not, in Cristobal or anytime prior to Cristobal have knowledge of the actual defect in the ship. To find gross negligence on the part of any of the defendants, this court must disregard the facts as testified to by eyewitnesses to the damage.

Rule 52(a) of the Federal Rules of Civil Procedure for the United States District Courts provides that as to actions tried without a jury:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses."

In an often quoted case, Mr. Justice Reed speaking for the United States Supreme Court in the case of *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948) states:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Clearly, the Trial Court's findings as to the critical facts in this case should not be reversed. Therefore, Iligan cannot prevail in their contentions in relation to knocking out the package limitation by showing gross negligence or wilful or wanton conduct, as the facts just do not support such a conclusion, even if such "doctrine" were now to be accepted as analogous to that of an intentional, deliberate deviation. The law has not been stretched so far in the jurisdiction. See, *Jones* v. *The Flying Clipper*, 116 F.Supp. 386 (S.D. N.Y. 1953).

POINT II

PURSUANT TO THE TERMS AND CONDITIONS OF THE STANDARD BILL OF LADING INCORPORATED IN THE AGREEMENT BETWEEN ILIGAN AND NEW YORK NAVIGATION, THE LIABILITY OF NEW YORK NAVIGATION IS LIMITED TO $500.00 PER PACKAGE.

There was no charter party as between the shipper and New York Navigation. The agreement of July 11, 1966, was simply a contract to provide sufficient vessels to carry plaintiffs' cargo at stipulated rates. It was a freight contract. It did not let any ship to the shipper for hire, and there was no charter hire, either on a time basis or a voyage basis. See *Nichimen Company, Inc.* v. *M.V. Farland* 462 F.2d 319 (2d Cir. 1972). The Agreement provided originally that New York Navigation was to furnish "suitable and seaworthy vessels", (E. 1) and that "In all other respects the loading and transportation herein shall be performed with NYNAV'S standard bill of lading, copy of which is appended to the Agreement." It further provided that, "In the event any clause in such bill of lading is inconsistent with any part of the Agreement, the Agreement shall be controlling."

The District Court held the Agreement of July 11, 1966 determined the obligations of New York Navigation to Iligan. (App. 55a). One of the obligations of New York Navigation was that to furnish seaworthy vessels. The District found that New York Navigation "clearly breached its express warranty to furnish 'seaworthy vessels'." (App. 57a).

However, the District Court, after carefully reviewing the history of absolute warranty of seaworthiness that had

been implied by the Courts in every contract of carriage of goods by sea and the subsequent reduction of the implied warranty by COGSA, 46 U.S.C. §1303(1), to an obligation to exercise due diligence to provide a seaworthy vessel, concluded that New York Navigation did not breach its implied warranty to exercise due diligence. (App. 58a).

A simple breach of warranty of seaworthiness, which does not require either negligence or wanton acts, would not result in a loss of limitations in bill of lading clauses. Before U.S. Carriage of Goods by Sea Act (COGSA), the carriers were free to stipulate any reasonable limit of liability in bills of lading. COGSA set a minimum of $500. See KNAUTH, OCEAN BILLS OF LADING—1953 at p. 270. A carrier should not be discouraged from increasing its obligation from due diligence to warranty of seaworthiness. It should be able to do so without running the risk of losing the other benefits of COGSA, such as the limitations, which are separate and apart from §1303(1).

What Iligan is saying here is that the defendants, more than breaching a simple warranty, more than failing to exercise due diligence, acted so wantonly that the law-given limitation in the bill of lading should be abrogated.

As to the completely innocent charterer in the case, there can be no question that justice and fair play require that the $500 limitation, contained in the statute and in the bill of lading, be preserved.

In other words, while the carrier may have contracted to increase its standard of liability from the "due diligence" of COGSA, 46 U.S.C. 1303(1), to an express agreement to furnish seaworthy vessels, this does not mean that the carrier thereby waives all its other defenses and limitations under COGSA.

Section 1305 of COGSA provides that:

> "A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities under this Act, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.
>
> The provisions of this Act shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this Act . . ."

We need not press the point that the Agreement (E. 1) was not a charter party and that the surrender or increase was not embodied in the bill of lading, for if there was a valid "increase or surrender" in paragraph (1) of the Agreement whereby the carrier agreed to provide "a sufficient number of suitable and seaworthy vessels", paragraph (11) makes it perfectly clear that "in all other respects" the provision of the New York Navigation's standard bill of lading would apply. That bill of lading incorporates COGSA and, of course, COGSA applies to the transportation in suit by its own force, 46 U.S.C. 1300, *et al.* Section 2 of COGSA (46 U.S.C. 1302) provides that:

> ". . . under every contract of carriage of goods by sea, the carrier . . . shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth . . ."

It would be strange indeed if a carrier who voluntarily contracted to surrender some particular right or increase some particular responsibility, was thereby penalized by losing all of his other defenses and limitations under COGSA.

Seaworthiness relates to liability, whereas the package limitation relates to damages. There is nothing in COGSA which suggests that an express agreement to increase the standard of liability implies a waiver of the package limitation or any other immunity to which the carrier is entitled under the Act.

Before COGSA, the rule was the same. The protection of a valuable clause was not lost because the carrier was liable for unseaworthiness. It would be different in the case of a deviation. This distinction was made in *The Caledonier,* 31 F.(2d) 257, 259 (2d Cir., 1929), a case in which the vessel sailed with insufficient coal to last the entire voyage:

> "When she left Antwerp on March 3rd, we cannot say that the master under-took the voyage with knowledge and intent that the vessel would stop at Bermuda for coal, in which case it would be a deviation of the voyage. *The Willdomino,* 272 U.S. 718, 47 S. Ct. 261, 71 L.Ed 491; *The Malcolm Baxter,* 277 U.S. 323, 48 S. Ct. 516, 72 L. Ed 901. Still the chance that was taken is sufficient to justify the claim of the appellee that the vessel was unseaworthy and, insofar as this unseaworthiness thus created contributed to the damages, a recovery may be had. *Hurlbut* v. *Turnure* (C.C.A.) 81 F. 208."

The Court granted "full compensation", but on reargument, recovery was limited by a $100 per package clause.

Iligan in its brief argues that the COGSA did not apply to the relations between Iligan and New York Navigation.

However, the Court below found that New York Navigation had effectively incorporated COGSA and that although the Agreement of July 11, 1966 was to control, a necessary part of that agreement was the incorporated and attached standard bill of lading. Without this incorporation, the Agreement of July 11, 1966 would be patently incomplete. Oddly enough Iligan takes this position being fully aware of the fact that carriage of goods by sea in foreign trade as defined by Sec. 1312 of COGSA occurred in this case. (Appellants' brief, pages 47-48). It would be absurd to contend that the U.S. Carriage of Goods by Sea Act was not incorporated to govern such a shipment.

Iligan also makes the novel argument that New York Navigation was not a "carrier" as defined in COGSA, 46 U.S. Code §1301(a), and therefore not afforded any protection by COGSA. This is indeed a strange argument when one considers the definition of the term "Carrier" in clause #2 of the bill of lading. (E. 36). That definition includes, among others, a time charterer. (E. 36). It is beyond dispute that New York Navigation time chartered the John Weyerhaeuser on a standard New York Produce time charter form (E. 391) and issued the bill of lading.

This argument by Iligan was obviously made "tongue and cheek", in light of the definition in clause 2 of the bill of lading, since Iligan in its brief labels New York Navigation a "simple voyage charterer". (See Appellants' brief page 51).

Plaintiffs' theory is obviously misplaced, as a simple reading of the cases cited by Iligan will show. Upon issuance of the bill of lading, New York Navigation became bound as the COGSA carrier. See *Demsey & Associates*

v. *S.S. Sea Star,* 461 F.2d 1009 (2d Cir. 1972); *United Nations Children's Fund* v. *S.S. Nordstern,* 251 F. Supp. 833 (S.D.N.Y. 1965); *Thyssen Steel Corporation* v. *S.S. Adonis,* 364 F. Supp. 1332 (S.D.N.Y. 1973).

POINT III

UNDER THE TERMS OF THE TIME CHARTER AND BILL OF LADING SEAWORTHINESS AND CARE OF CARGO WAS THE RESPONSIBILITY OF THE SHIPOWNER. WEYERHAEUSER MUST INDEMNIFY THE CHARTERER FOR ANY LOSS IN THIS CASE, INCLUDING REASONABLE COUNSEL FEES AND EXPENSES.

The obligation of seaworthiness is chargeable to the owner of the vessel. *United States* v. *S.S. Wabash,* 331 F. Supp. 145 (S.D.N.Y. 1971). The charterer may rely on the ship's master, on whose behalf the bill of lading was signed, to protect the cargo against unseaworthiness of the vessel. *Oxford Paper Co.* v. *The Nidorholm,* 282 U.S. 681, 684 (1931); *Luckenbach* v. *W. J. McCahan Sugar Refining Co.,* 248 U.S. 139, 150 (1918); *Olsen* v. *United States Shipping Co.,* 213 F. 18, 20-21 (2d Cir. 1914).

Under the terms of the time charter between Weyerhaeuser and New York Navigation, the shipowner agreed to provide a vessel that was "tight, staunch, strong and in every way fitted for the service . . . " Consequently, Weyerhaeuser warranted to New York Navigation that the vessel would be seaworthy for the transportation of the cargo in suit. *Demsey & Associates, Inc., et al.* v. *Sea Star, supra, Luckenbach* v. *W. J. McCahan, supra.* Even without this specific language, the warranty would be implied by General Maritime Law. The *Caledonia,* 157 U.S. 124 (1895).

The term "seaworthiness" is read to mean fitness for the use anticipated. See *The Southwark,* 191 U.S. 1 (1903).

Under the time charter, the owner bears the continuing responsibility for the seaworthiness of the vessel. *Nichimen Company, Inc.* v. *M.V. Farland, supra.* Clause 1 provides that the owner will keep the vessel fit throughout the charter term ". . . and keep the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service." See GILMORE & BLACK, The Law of Admiralty, §4-14, p. 204. Although both the charterer and the owner were bound by the bill of lading, the primary responsibility in this case rested with the owner because the cargo damage resulted from a defect in the vessel which the Master had failed to discover and correct. *Nichimen Company, Inc.* v. *M.V. Farland, supra.* See also *United States* v. *S.S. Wabash, supra.*

The *Wabash* is very similar to this case and there the owner was held liable to indemnify the charterer, including attorneys' fees. See also, *Nichimen Company, Inc.* v. *M.V. Farland, supra.* It is expected that counsel will be able to stipulate the amount of attorneys' fees and expenses.

It is logical and reasonable that the shipowner, who is *solely* responsible for the maintenance and repair of its vessel, should bear the loss in cases of unseaworthiness or lack of due diligence.

As between Weyerhaeuser and New York Navigation Company, the shipowner warranted the seaworthiness of the vessel. The general incorporation of C.O.G.S.A. and the Harter Act in the time charter (Clause 24), does not overcome the *specific* language expressly setting forth the war-

ranty. Discussing the exact same time charter (New York Produce Exchange Form) GILMORE & BLACK say (§4-14, p. 204):

> "The time charter is, compared with the voyage charter, an arrangement of some permanency, and it is clear from these clauses that the charterer *is being assured of a good deal more* about the character of the ship he is getting . . . Most important, it is to be noted that the warranty of seaworthiness, implied by law in every charter, is not only not abolished but is reinforced by the word 'good' in the description of the vessel, and by the provision that she is to be 'tight, staunch, strong, and in every way fitted for the service.'" (Emphasis added)

The time charter in this case is also exactly the same as the one involved in the *Demsey & Associates, Inc. et al.* v. *Sea Star, supra.*

If the charterer is liable to cargo, the shipowner is liable to it and primarily liable over to plaintiffs. *Nichimen Company, Inc.* v. *The Farland, supra,* at p. 3030. See *Ore Steamship Corporation* v. *D/S A/S Hassel,* 137 F.2d 326, at 329 (2d Cir., 1943). Of course, the shipowner, since it was sued, would also be *directly* liable to plaintiffs.

It was stipulated that New York Navigation's attorneys placed Weyerhaeuser's attorneys on notice of the claim and asked them to take over the defense of the charterer. (App. 700a-701a).

New York Navigation was cast into damages in this case, *solely* because of the condition of the vessel and acts

of the Master. The maintenance of the ship was at all times *solely* the duty of the shipowner. Therefore, the shipowner must hold the charterer harmless.

There is nothing to the argument that the charterer gave the shipper a greater "bundle of rights" in the Agreement than the shipowner did in the bill of lading. As Mr. Grevers pointed out in his testimony that New York Navigation protected itself, after signing the Agreement to furnish seaworthy vessels to the shipper, by intentionally requiring the shipowner to sign a New York Produce form charter party, which in turn warranted seaworthiness of the vessel to the charterer. (App. 480a-481a). The express and specific warranty of seaworthiness in the time charter is not superseded by the general incorporation of COGSA.

Nor is there anything to shipowner's argument that the plaintiffs would not let the charterer out of the case. The shipowner could have taken over charterer's defense, thus avoiding the legal expenses incurred by the charterer.

Even if plaintiff had not prevailed, Weyerhaeuser would be required to pay New York Navigation's reasonable counsel fees.

In 1964, this Court required a stevedore to indemnify a shipowner for reasonable counsel fees expended by the shipowner in the successful defense of a personal injury suit. The Court explained its rationale as follows:

> "The determination that the ship was neither negligent nor unseaworthy does not, however, relieve the stevedore from liability to the shipowner for breach of warranty of workmanlike service. Recovery over may be had even if the shipowner is exonerated from

fault or unseaworthiness. . . . While the shipowner has been successful in defense of the main action, he has suffered loss, in the form of attorneys' fees and expenses in the defense, caused by the actions of the stevedore's employees in two respects which we hold were in breach of the stevedore's warranty of workmanlike service. *Guarracino* v. *Luckenbach Steamship Company,* 333 F.2d 646, 648 (2d Cir. 1964); *see also Strachan Shipping Co.* v. *Koninklyke Nederlandsche S.M., N.V.,* 324 F.2d 746 (5 Cir. 1963)."

POINT IV

NEW YORK NAVIGATION IS ENTITLED TO AN ADDITIONAL AWARD FOR COUNSEL FEES INCURRED IN DEFENDING AGAINST THE CLAIM OF PLAINTIFFS ON THIS APPEAL.

The Court below awarded judgment in favor of the New York Navigation on their claim for indemnity, to include counsel fees incurred in the defense of plaintiffs' claim. New York Navigation respectfully submits that, in the event of an affirmance of that portion of the judgment, they are entitled to a further award for counsel fees to the extent that their efforts on this appeal are directed to resisting the claims of plaintiff. *Misurella* v. *Isthmian Lines, Inc.,* 328 F.2d 40 (2d Cir. 1964); *Calderone* v. *Naviera Vacuba S/A,* 328 F.2d 578 (2d Cir., 1964). As this court stated in *Nicroli* v. *Den Norske Afrika-og Australielinie,* 332 F.2d 651 (2d Cir., 1964) at page 656:

> "However, here a good portion of the shipowner's brief is devoted to resisting the plaintiff's efforts to increase his recovery, and the shipowner is to that extent entitled to reimbursement."

Right after the appeal was filed, charterer's counsel called upon the owner's counsel to take over the appeal and was met with a refusal.

CONCLUSION

THE DECISION BELOW SHOULD BE AFFIRMED. IF NOT SO AFFIRMED, IT SHOULD BE REVERSED BOTH AS TO NEW YORK NAVIGATION AND WEYERHAEUSER AND THE COMPLAINT DISMISSED, BUT NEW YORK NAVIGATION'S RIGHT TO RECOVER COUNSEL FEES FROM WEYERHAEUSER SHOULD BE PRESERVED. IN ANY EVENT, THE INNOCENT CHARTERER SHOULD BE AFFORDED FULL INDEMNITY.

Respectfully submitted,

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